No. 355

Supreme Court of the United States

OCTOBER TERM 1968

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., COMMON CARRIER CONFERENCE — IRREGULAR ROUTE, REGULAR COMMON CARRIER CONFERENCE,
Appellants,

vs.

UNITED STATES OF AMERICA

and

INTERSTATE COMMERCE COMMISSION, et al., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

JOHNSON, MIJICH & HOLTZCLAW
Counsel for PACIFIC PROGRESS SHIPPERS ASSOCIATION, INC.,
Appellee

1610 IBM Building
Seattle, Washington 98101
MAin 4-2832

THE ARGUS PRESS SEATTLE, WASHINGTON

No. 355

Supreme Court of the United States

OCTOBER TERM 1968

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., COMMON CARRIER CONFERENCE — IRREGULAR ROUTE, REGULAR COMMON CARRIER CONFERENCE,
Appellants,

vs.

UNITED STATES OF AMERICA

and

INTERSTATE COMMERCE COMMISSION, et al., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

JOHNSON, MIJICH & HOLTZCLAW
Counsel for PACIFIC PROGRESS SHIPPERS ASSOCIATION, INC.,
Appellee

1610 IBM Building
Seattle, Washington 98101
MAin 4-2832

THE ARGUS PRESS SEATTLE, WASHINGTON

Supreme Court of the United States

OCTORER TERM 1968

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., COMMON CARRIER CONFERENCE — IRREGULAR ROUTE, REGULAR COMMON CARRIER CONFERENCE, *Appellants,* vs. UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION et al., *Appellees.*	No. 355

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

Pursuant to Rule 16 (1) (c) and (d) of the Rules of this court, Pacific Progress Shippers Association, Inc, moves that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a Three-Judge District Court (JS App. 4a-7a) dismissing appellants' suit to set aside an order (JS 8a-102a) of the Interstate Commerce Commission. The basic issue is the validity of the Commission's finding that

none of the defendants in the cause were shown to be engaged in service as a freight forwarder in violation of Sec. 410(a) of the Interstate Commerce Act as alleged in the complaint and that the complaint should be dismissed.

PACIFIC PROGRESS SHIPPERS ASSOCIATION, hereinafter referred to as "Pacific", was incorporated in 1961 as a non-profit corporation under the laws of the State of Washington for the purpose of procuring the "pooling, consolidation, transportation and distribution of freight..."(Record, Ex. 5).

Interstate Commerce Act, Sec. 402 (c) (1), 49 U.S.C. Sec. 1002 (c) (1) provides as follows:

> "The provisions of this part shall not be construed to apply (1) to the operations of a shipper, or a group or association of shippers, in consolidating or distributing freight for themselves or for the members thereof, on a non-profit basis, for the purpose of securing the benefits of carload, truckload, or other volume rates, . . . "

This legislative pronouncement was lawfully enacted by Congress and Pacific was incorporated in 1961 with a view toward realizing the economic benefits to its corporate members specifically contemplated by the legislation. Pacific has continuously operated as an association of shippers under the above legislative provision.

Appellants are national organizations of common carriers by motor vehicles. As stated in their Jurisdictional Statement, p. 4, their functions and purpose of existence are to from time to time institute and participate in administrative and judicial proceedings concerning the lawfulness of the operating practices

of persons engaged in performing transportation or in rendering transporation services in competition with members of their organizations. Apparently in response to this purpose of their existence, they filed complaint with the Interstate Commerce Commission on September 11, 1963, alleging that Pacific and other named businesses and individuals were performing certain transporation services unlawfully in violation of designated sections of the Interstate Commerce Act and that Pacific was engaging in services as a freight forwarder without Commission authority. The complaint was the subject of extended hearings held before the Interstate Commerce Commission delving into all aspects of Pacific's operations. Thereafter, the hearing examiner filed an extended and lengthy report and recommended order in which he concluded that the operations and functions of Pacific were proper and lawful and recommended that the complaint be dismissed.

Feeling aggrieved by the conclusion reached, appellants noted their exceptions to the report and recommended order of the examiner. At a session of the Interstate Commerce Commission held on June 20, 1966, speaking through its Division One, the Commission dismissed the complaint and concurred in the disposition of the case by the examiner. (JS App. 8a-90a). The next step in the sequence of events leading to the submission of this court was an appeal to a Three-Judge United States District Court for the District of Columbia. After consideration of briefs by all affected parties and oral arguments, the Three-Judge District Court by per curiam opinion agreed with the Commission and concluded that the complaint should be dismissed. (JS App. 4a-5a). Now appellant seeks review by this court.

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this court.

By their jurisdictional statement, appellants solicit further judicial review by seeking to invoke the jurisdiction of this court to decide two questions. The first is the question regarding an alleged statutory qualification for sanctioned Interstate Commerce Commission exemption of a shipper association, such as Pacific, which is a corpporate legal entity and, secondly, the question of adequacy of findings and conclusions as required by the Administrative Procedure Act (5 U.S.C., Sec. 557), as well as the Three Judge District Court consideration of such procedural question under the terms of Sec. 706 of the Administrative Procedure Act, 5 U.S.C., Sec. 706.

Referring to the provisions of the Interstate Commerce Act cited above, Congress saw fit to exempt from regulation groups or associations of shippers consolidating or distributing freight for members of the associaation on a non-profit basis. Nowhere in the congressional enactment is found language providing that if such groups or associations of shippers are organized into non-profit corporations they are not qualified for exemption. All parties, in briefs before the Three-Judge District Court, engaged in detailed analyses of this question and gave extensive consideration to Commission pronouncements regarding such shipper groups. The entire matter was the subject of considerable argument. However, the court, after considering such arguments, pierced through the entire maze and reached the correct conclusion that the answer to the problem presented by the complaint is

more directly reached by direct consideration of the question of whether the evidence supported the conclusions that the operations of Pacific brought it within the terms of the statutory exemption. (JS App. 5a).

An analysis of the operations of Pacific in its function as an association of shippers which operations and functions are described in the voluminous record before the Commission, all as found by the examiner and set forth in his Statement of Facts, Conclusions and Findings (JS App. 16a-70a), dictate that Pacific is an organization envisioned by the congressional enactment of Sec. 402 (c) (1), 49 U.S.C., Sec. 1002 (c) (1) of the Interstate Commerce Act. Pacific operates no vehicles or other transportation equipment but rather utilizes the transporation provided by authorized and regulated carriers, both for the consolidation and distribution of commodities as well as for the actual transport of those commodities between points of consolidation and distribution for its members.

The record before the Commission and before the District Court as found in Jurdisdictional Statement App. 10a-90a details the organization of Pacific as an association, their designation of an agent to conduct their day to day operations, their periodic meetings to maintain direct supervision and control of the operations by the shippers, and their history of successful operations and utilization of authorized rail carriers as well as motor carriers for consolidation and distribution. Weighing Pacific's operations on the one hand and the exemption provisions of the Interstate Commerce Act on the other, the Commission concluded that Pacific falls within the definition of

an association of shippers consolidating or distributing freight for themselves or their members, on a non-profit basis, for the purpose of securing the benefits of carload, truckload or other volume rates.

The appellants have urged throughout that Pacific cannot qualify for exemption from regulation by the Commission because Pacific is an incorporated non-profit corporation. Appellants seek judicial aid in modifying the Congressional provision to suit their own preference and interest. This relief is solicited in the face of judicial determination by this court that the fact of incorporation is not determinative in passing upon the legality of the association operations. *Pacific Coast Wholesalers Ass'n v. U.S.*, 338 U.S. 689 (1950), affirming per curiam *Pacific Coast Wholesalers Ass'n v. U.S.*, 81 Fed. Supp. 991 (So. Dist. Cal. 1949).

Addressing ourselves to the second allegedly substantial question raised by appellants' Jurisdictional Statement (JS 37), it is submitted that the record is voluminous regarding the evidence, findings and conclusions of the Commission in reaching its decision. It has been judicially determined that the Commission need not make specific findings on all material issues of fact, law or discretion presented on the record. The criterion is if the appellate court and the parties to the proceeding are apprised of the basis of the agency's decision and order by looking to the total record, including the examiner's report and recommended order, the requirements of the Administrative Procedures Act respecting findings are met: *Key v. U.S.*, 263 Fed.Supp. 544 (So.Dist.Ind., 1966). Further, the courts have determined that the Commission is not required to make as detailed findings of fact

as required of a trial court. *Chicago & E.I.R. Co. v. U.S.,* 107 Fed. Supp. 118 (So. Dist. Ind., 1952). A review of the Decision and Order of the Commision (JS Auu. 8a-90a) in this case dictates the conclusion that the total record, including the examiner's report and recommended order, manifestly apprises the parties of the basis of the agency decision. The Commission's Decision and Order also abides the *Key* case, *supra,* in authorizing and endorsing Commission procedure in the adoption of reports and recommended orders of its examiners by short form pursuant to Attorney General's Manual on the Administrative Procedure Act (1947) at p. 86.

CONCLUSION

The Judgment of the District Court should be affirmed.

Respectfully submitted,

JOHNSON, MIJICH & HOLTZCLAW
Counsel for PACIFIC PROGRESS SHIPPERS ASSOCIATION, INC.,
Appellee

1610 IBM Building
Seattle, Washington 98101
MAin 4-2832

CERTIFICATE OF SERVICE

I, James T. Johnson, one of counsel for PACIFIC PROGRESS SHIPPERS ASSOCIATION, INC., appellee herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 27 day of August, 1968, I served copies of the foregoing document on the parties hereto, postage prepaid, to the following:

On Honorable Edwin R. Griswold, Solicitor General, Department of Justice, Washington, D. C. 20530, and John H. D. Wigger, Esq., Attorney, Department of Justice, Washington, D. C. 20530.

On Robert W. Ginnane, Esq., General Counsel, and Manny H. Smith, Attorney, Interstate Commerce Commission, Washington, D. C. 20423.

On Ronald N. Cobert, Esq., 600 Madison Building 1155 15th Street, N.W., Washington, D. C. 20005.

On Rea, Cross & Knebel, 917 Munsey Building, 1329 E Street, N.W., Washington, D. C. 20004.

JAMES T. JOHNSON

.....

James T. Johnson